Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Infrastructure Sharing Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-237
	)	
	)	

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

Pursuant to the Public Notice released November 22, 1996, in the above docket ("Infrastructure NPRM"), the Association for Local Telecommunications Services ("ALTS") hereby offers these comments on the Commission's proposed implementation of Section 259 of the Telecommunications Act of 1996.

SUMMARY

Section 259 must be construed in a fashion which is consistent with Congress' fundamental goal of furthering competition in local telecommunications markets. Robust implementation of Section 259 can be achieved without permitting qualifying carriers and provisioning incumbents to agree not to compete (a permission the Commission clearly has no authority to grant). Qualifying carriers should be permitted to use Section 259 services and facilities for any purpose, provided only that when such services are utilized outside the qualifying carrier's universal service territory, the provisioning incumbent must be compensated for such use pursuant to the pricing standards of Section 251.

I. SECTION 259 IS A LOGICAL EXTENSION OF THE PRO-COMPETITIVE POLICIES ESTABLISHED IN THE 1996 ACT.

Section 259 of the Telecommunications Act of 1996 ("1996 Act") is a logical extension of the pro-competitive policies reflected throughout the 1996 Act in general, and in the interconnection requirements of Section 251 in particular. Section 251 provides a wide range of mechanisms under which any telecommunications carrier can obtain services and facilities from existing carriers, including the very carriers with which those carriers intend to compete.

Section 259 addresses the competitive needs of a much more targeted subset of carriers. It is intended to assist carriers that are designated as universal service providers under Section 214(e), but that suffer from diseconomies of scope and scale in their universal service serving area (§ 259(a)). Under such circumstances, the qualifying carrier can request "infrastructure, technology, information, and telecommunications facilities and functions" to provide service in the qualifying carrier's universal service territory. This provisioning permits qualifying carriers to succeed in competing for business within their universal service territory.

In addition to stimulating a qualifying carrier's ability to compete in its own territory, Section 259 also facilitates qualifying carriers' competitive entry outside their own

territory. The provisioning of infrastructure services by an incumbent to a qualifying carrier pursuant to Section 259 serves as prima facie evidence that such services can and should also be made available by the incumbent for any purposes pursuant to Section 251, except in those few hypothetical situations where the matters provisioned pursuant to Section 259 might extend beyond those provided under Section 251. Accordingly, any qualifying carrier that chooses to use Section 259 infrastructure sharing arrangements to compete outside its serving area (including competing in the service area of the provisioning incumbent) would be free to do so, provided that the price it pays for using the facilities or services outside its own universal serving area is governed by Section 251.

II. THERE IS NO PROVISION IN THE 1996 ACT FOR "NON-COMPETING CARRIERS," NOR IS SUCH A CATEGORY NECESSARY TO IMPLEMENT SECTION 259 OR ANY OTHER PART OF THE ACT.

The Infrastructure NPRM indicates at one point that: "Section 259 appears to apply only in instances where the qualifying carrier does not seek to offer certain services within the incumbent LEC's exchange area ...." (at ¶ 11). Later on the Infrastructure NPRM again asserts that: " ... because agreement pursuant to Section 259 will be between non-competing carriers, detailed national rules may not be necessary to promote cooperation" (at ¶ 25).

ALTS respectfully submits that there is no such category as

"non-competing carriers" under any part of the Telecommunications Act of 1996. Furthermore, the creation of such a status would be bad policy, impossible to implement, encourage criminal violations of Federal antitrust law, and be entirely unnecessary to the proper implementation of Section 259.

Starting with the text of Section 259, there is no requirement that a qualifying carrier and a provisioning incumbent not compete in order to implement Section 259. Section 259(b)(6) does require that incumbents not be required to enter infrastructure agreements "for any services or access" which qualifying carriers intend to offer to end users in the incumbent's territory. However, this section in no way prohibits qualifying carriers from competing with the provisioning incumbent. It simply requires a qualifying carrier to either build its own infrastructure for that purpose, or else pay for the infrastructure under the Section 251 pricing standards.

This absence of any statutory prohibition on competition is underscored in the legislative history of Section 259, which states that: "The bill does not grant immunity from the antitrust laws for activities undertaken pursuant to this section" (S. Conf. Rep. No. 104-230, 104th Cong., Sess. 11 (1996)). Accordingly, any attempt by two carriers to agree not to compete with one another in order, purportedly, to implement Section 259 would violate the criminal provisions of the Sherman Act as an

illegal attempt at cartelization of local telecommunications markets, in addition to violating the Sherman Act's civil provisions.

Indeed, the creation of any "non-competing companies" status would be fundamentally inconsistent with the intent and structure of the entire 1996 Act. As the Infrastructure NPRM notes, new Part II of Title II of the 1934 Act is designated by Congress as "Development of Competitive Markets." And throughout the 1996 Act, Congress took care to address specific policy concerns that have been used in the past to justify non-competitive approaches -- universal service, financial impact on small companies, the need for infrastructure sharing in the presence of diseconomies of scope and scale -- through focused, explicit mechanisms, such as the Universal Service provisions of Section 254, the exemption and waiver request mechanisms available to small companies in Section 251(f), and in the infrastructure sharing provisions of Section 259. Congress' refusal to grant antitrust immunity in Section 259, combined with its careful attention to the policy concerns usually invoked to justify non-competitive solutions, strongly underscores the usual maxim that implicit statutory repeals of the antitrust laws are disfavored. Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963); see also the cases cited in Federal Telecommunications Law, Kellogg, Thorne and Huber, 1992, at 147.

Furthermore, it would be virtually impossible for the Commission to police the operation of "non-competing carrier" agreements in connection with Section 259. If a qualifying carrier were to respond to an RFP in the territory of an incumbent provisioning infrastructure services, how would the Commission decide whether the incumbent would be entitled to terminate infrastructure services? Would an infrastructure sharing arrangement terminate automatically upon a qualifying carrier's entry into a provisioning incumbent's territory, or would the qualifying carrier only be liable for the incumbent's lost profits? Is only a promise not to compete adequate, or must it also be contractually binding (assuming such agreements were enforceable by the courts)?

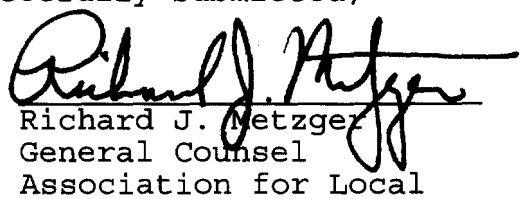
The point here is simple. The Commission has attempted in the past, for example, to separate a competitive "private line" market from a non-competitive "MTS" market, and also a competitive "special services" market from a non-competitive "switched access" market. The principal lesson it learned from these experiments in trying to fence-off competition is that such efforts are doomed, and quickly collapse under market, legal, and technological pressures. The Commission should not repeat past errors here by trying to carve out one last bastion of monopoly provisioning in Section 259.

Finally, nothing in the policy or language of Section 259 would be frustrated by insisting that qualifying carriers and provisioning incumbents retain their respective rights to engage in free and vigorous competition with each other. Incumbent carriers would be fully protected by the pricing standards of Section 251 whenever qualifying carriers wished to use their infrastructure arrangements to compete in the incumbent's territory. And qualifying carriers would retain all their competitive options, in addition to obtaining full infrastructure access.

CONCLUSION

For the foregoing reasons, ALTS requests that the Commission implement Section 259 consistent with the pro-competitive intent of Congress reflected throughout the 1996 Act.

Respectfully submitted,

By: 

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December 20, 1996

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments by the Association for Local Telecommunications Services was served December 20, 1996, on the following persons by first-class mail or hand service, as indicated.

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